jurisdictions recognize the estoppel,[6] unless fraud or mistake makes it inequitable,[7] reasoning that the creation of the relationship of landlord and tenant in itself alters the position of the parties.

The Supreme Court of Georgia, in a recent decision, though professing to accept the doctrine of this second class of cases even though the lessee at the time of the plaintiff's lease was already in possession under a third person, limits the estoppel in favor of the second lessor to the duration of the second term. *Hodges* v. *Waters*, 52 S. E. Rep. 161. The decision seems almost to confound the legal estoppel of Lord Coke with the present equitable estoppel. It has been held, in a state of facts similar to those in the present case, that the tenant, by notice to the second landlord, may terminate the tenancy with the term demised, though he continues in possession.[8] In the present case he failed to do so; and the plaintiff, thus lulled into security, allowed the holding over to develop by lapse of time into a tenancy from year to year,[9] and permitted the relationship of landlord and tenant to continue. The landlord's position is, then, no better than during the existence of the original term, when it seemed equitable to raise the estoppel, and the termination of the lease should be without effect on the continuance of the estoppel.

RECENT CASES.

ACTIONS — MOTIVE IN INSTITUTING ACTION AS DEFENCE THERETO. — The plaintiff, with the object of bringing about the bankruptcy of the defendant, a co-director, and of having him thereby disqualified and removed from the directorate, took an absolute assignment from the defendant's creditors, with a covenant that the amount of the debts recovered, less costs, should be paid over to the assignors; and notice of the assignment was given to the defendant. *Held*, that the plaintiff may maintain an action against the defendant for the debts so assigned. *Fitzroy* v. *Cave*, 93 L. T. R. 499 (Eng., C. A., June 9, 1905).

Although the question how far a defendant's motive should determine his liability for causing damage to a plaintiff is involved in much conflict, the courts are harmonious in holding that even the most reprehensible motive does not make him liable for causing the plaintiff to suffer the consequences of the latter's own breach of duty. See 18 HARV. L. REV. 411, 412. Thus, the most vindictive motive does not give rise to a cause of action for ejecting a trespasser or for collecting a debt. *Brothers* v. *Morris*, 49 Vt. 460; *South Royalton Bank* v. *Suffolk Bank*, 27 Vt. 505. Neither can the motive for suing a trespasser or a debtor furnish a defence to the action. *Jacobson* v. *Van Boening*, 48 Neb. 80; *Bragg* v. *Raymond*, 11 Cush. (Mass.) 274. And even where the plaintiff, with evil motive, procures an assignment of a mortgage to foreclose it, or becomes a shareholder in order to enjoin a corporation, paramount public policy requires that the court should look at the cause of action alone. *Morris* v. *Tuthill*, 72 N. Y. 575; *Bloxam* v. *Metropolitan Ry. Co.*, L. R. 3 Ch. 337, 353. There is no hardship in compelling a defendant to discharge his obligation; but there is grave danger in permitting him to plead the motive of every creditor who seeks to enforce it.

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[6] Lyon *v.* Washburn, 3 Col. 201.
[7] See 2 Taylor, Landlord and Tenant, § 707.
[8] Voss *v.* King, 33 W. Va. 236.
[9] See 1 Taylor, Landlord and Tenant, §§ 22, 65.

AGENCY — TERMINATION OF AUTHORITY — NOTICE TO THIRD PARTIES. — Statutes allowed the recording of a power to sell land and required the revocation of such recorded power to be recorded. *Held*, that the recording of an instrument purporting to revoke the agency did not give constructive notice of its contents to the agent; and that a mortgage thereafter made by him to a third party, who had no actual notice, was binding against the principal. *Best* v. *Gunther*, 104 N. W. Rep. 918 (Wis.). See NOTES, p. 373.

ATTACHMENT — OF REALTY — EFFECT. — After a federal court had, by its marshal, attached certain land, a state court appointed a receiver to take possession of it. *Held*, that a state court cannot enjoin the federal marshal from selling the land. *Beardslee and McDermott* v. *Ingraham and Campton*, 34 N. Y. L. J. 1415 (N. Y., Ct. App., Jan. 23, 1906).

For a contrary view, see 19 HARV. L. REV. 210.

BANKRUPTCY — DISCHARGE — EFFECT OF DISCHARGE UPON LIABILITY OF SHAREHOLDER FOR CALLS. — In bankruptcy proceedings against a holder of partly paid shares in a corporation, the corporation proved for the amount uncalled upon the shares, and received a dividend. Subsequently the corporation went into voluntary liquidation, and after satisfying all liabilities had surplus assets available for distribution among its shareholders. *Held*, that for the purpose of distributing the surplus assets, the shares of the bankrupt are not to be treated as fully paid. *In re West Coast Gold Fields* (*Lim.*), 22 T. L. R. 39 (Eng., C. A., Nov. 9, 1905).

In the distribution of the surplus assets of a corporation, holders of fully paid shares are entitled to receive the amount paid by them in excess of that paid upon partly paid shares before the holders of the latter are entitled to receive anything. *In re Hodges' Distillery Company*, L. R. 6 Ch. 51; *Krebs* v. *The Carlisle Bank*, 2 Wall., Jr. (U. S. C. C.) 33. The result of the principal case is therefore clearly correct unless the proof in bankruptcy is equivalent in law to full payment. The general principle, however, is that a discharge in bankruptcy does not extinguish the obligation, but merely bars the remedy. The discharge is no defense to an action upon a provable debt unless specially pleaded, and the privilege of pleading it is in general restricted to the bankrupt. *Jenks* v. *Opp*, 43 Ind. 108; *Moyer* v. *Dewey*, 103 U. S. 301. At common law a promise to pay a debt barred by a discharge is binding without further consideration. *Kirkpatrick* v. *Tattersall*, 13 M. & W. 766. A discharge received by a principal does not terminate the liability of the surety. *Ellis* v. *Wilmot*, L. R. 10 Ex. Ch. 10. It has also been held that the amount of indebtedness of a discharged bankrupt to a decedent's estate must be deducted from the amount of the former's distributive share in the estate. *Wilson* v. *Kelley*, 16 S. C. 216; but see *Stammers* v. *Elliott*, L. R. 3 Ch. 195.

BANKRUPTCY — EXEMPTIONS — LIFE-INSURANCE POLICY. — A bankrupt at the time of his adjudication held three insurance policies. One only of the policies contained an agreement for a cash surrender value, but the other two did in fact have a surrender value which the insurance company signified its willingness to pay. The question arose whether the bankrupt's privilege, under § 70 a (5) of the National Bankruptcy Act of 1898, to redeem the policies by the payment to his trustee of their "cash surrender value," applied to those policies for the surrender of which the insurance company had not contracted to pay. *Held*, that the provision in the Act applied only to the policy containing a definite stipulation for a cash surrender value. *Van Kirk* v. *Vermont Slate Co.*, 140 Fed. Rep. 38 (U. S. Dist. Ct., N. D., N. Y.).

The phrase "cash surrender value," used in the Act, is frequently and naturally employed to describe a policy's present worth even where the contract contains no stipulation for any payment by the company. An interpretation of the phrase which would have included such a policy would not, therefore, have been unwarranted. Moreover, there appears little basis on principle for applying the phrase to those policies alone upon the surrender of which the company is bound to pay. Authorities agree that if the policy has no present worth, it is

exempt. *In re Buelow*, 98 Fed. Rep. 86. The trustee's interest is, therefore, limited to present worth. Furthermore, if the payment of its present worth is guaranteed, it may be redeemed by the bankrupt as provided by the Act. To allow the bankrupt to redeem from his trustee a policy for the surrender of which the company was under no obligation to pay value would be equally favorable to interests represented by the trustee; and such a rule would extend the benefits of the exemption to a case clearly within its spirit. *Cf. In re Josephson*, 121 Fed. Rep. 142. The present decision is, however, supported by the weight of authority. *In re Mertens*, 131 Fed. Rep. 972.

CARRIERS — PERSONAL INJURIES TO PASSENGERS — LIABILITY FOR SERVANT'S ACT. — The plaintiff was a passenger on one of two of the defendant's street cars, which were passing each other. The conductor of the other car, in sport, threw a dead hen towards the car on which the plaintiff was riding, and thereby injured him. *Held*, that the defendant is liable. *Hayne* v. *Union St. Ry. Co.*, 33 Banker & Tradesman 2683 (Mass., Sup. Ct., Dec. 1, 1905).

A common carrier is liable for all injuries to passengers caused by the misconduct of its servants engaged in executing the contract of carriage. *Stewart* v. *Brooklyn, etc., Rd. Co.*, 90 N. Y. 588. The present decision seems to involve an extension of this doctrine unwarranted by the theory on which it is based. A carrier owes the duty to each passenger to use the utmost care practicable to protect him from violence. See 15 HARV. L. REV. 670. Accordingly the carrier includes the furnishing of protection to passengers among the duties of those servants who execute their contracts of carriage. When these employees, therefore, willfully or negligently fail to protect the passenger from the violence of a fellow passenger, or *a fortiori* against their own violence, according to settled principles of agency, the carrier is liable. *Spohn* v. *Missouri, etc., Ry. Co.*, 101 Mo. 417; *Craker* v. *Chicago, etc., Ry. Co.*, 36 Wis. 657. The liability, however, is not for the servant's acts of commission, but for the correlative acts of omission. See 12 HARV. L. REV. 504. In the principal case, since the servant whose acts were complained of, as conductor of another car, was under no duty to protect the plaintiff, he committed no act of omission for which the carrier is liable; his positive act was plainly without the scope of his employment. See *Sachrowitz* v. *Atchison, etc., Rd. Co.*, 37 Kan. 212, 216.

CARRIERS — PERSONAL INJURY TO PASSENGERS — RIGHT TO ENTER STATION. — The plaintiff, having a proper ticket and with intent to become a passenger, went to the defendant's station shortly before train time, but found it locked. The village marshal (though not an agent of the company) unlocked the door and admitted the plaintiff to the waiting-room, where she was injured, while in the exercise of due care, by reason of a defect in the floor negligently left unrepaired by the defendant. *Held*, that the plaintiff is not a trespasser, but is entitled to recover as an expectant passenger. *Chicago and A. R. Co.* v. *Walker*, 75 N. E. Rep. 520 (Ill.).

A railroad owes the duty to take reasonable care for the safety and comfort of those who present themselves at a proper time, in a proper manner, and at a proper place upon its premises with intent to become passengers. *Exton* v. *Central, etc., R. Co.*, 33 Vr. (N. J.) 7. This includes the duty to keep its waiting-room safe and properly lighted for a reasonable time before the arrival of each passenger train. *McDonald* v. *Chicago, etc., R. Co.*, 26 Ia. 124. Upon the facts stated it seems that the plaintiff, when she presented herself at the station, became entitled to the rights of an expectant passenger. The defendant clearly failed to afford her due accommodation. It now sets up its improper failure to open and light the waiting-room as the basis of its contention that when the plaintiff entered therein she became a trespasser, simply because the door was unlocked by one not an agent of the company. But no party may set up his own wrong as a part of his case. 4 Inst. 279. The defendant's contention, therefore, properly fails.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT OF STOCKHOLDERS TO ELECT DIRECTORS. — A minority stockholder prayed for a decree

enjoining the Equitable Life Assurance Society from amending its charter so as to allow its policy holders to elect twenty-eight out of fifty-two directors. *Held*, that the right to influence the management of a company by the selection of its directors is a property right, of which the amendment would deprive the plaintiff without due process of law, and that the motion should therefore be granted. *Lord* v. *Equitable, etc., Society*, 109 N. Y. App. Div. 252.

This decision is an affirmation of the decision in the lower court, which was favorably commented upon in 19 HARV. L. REV. 62.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — FREEDOM OF CONTRACT: EMPLOYMENT OF UNION LABOR. — *Held*, that Section 171a of the New York Penal Code, which declares it to be a misdemeanor to require as a condition of employment that the employee shall not belong to a labor organization, violates the state constitution and the Fourteenth Amendment to the Federal Constitution by infringing the right of contract. *People* v. *Marcus*, 34 N. Y. L. J. 1149 (N. Y., App. Div., Dec., 1905). See NOTES, p. 368.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES: CLASS LEGISLATION — CLASSIFICATION OF CITIES. — *Held*, that a New York statute, regulating employment agencies in cities of the first and second classes only, does not conflict with the "equal rights" clause of the Fourteenth Amendment to the Federal Constitution. *People ex rel. Armstrong* v. *Warden, etc., of the City of New York*, 183 N. Y. 223.

For a discussion of the constitutional principles permitting such classification, see 16 HARV. L. REV. 59. The case adds one more instance to those in which statutory regulation may discriminate between localities.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWER. — An ordinance restricting gambling was passed by a county board of supervisors in pursuance of statutory authority empowering it to make local police regulations. *Held*, that the legislature may properly delegate such legislative power to county boards. *Hawaii ex rel. County of Oahu* v. *Whitney*, Sup. Ct of Hawaii, Nov. 24, 1905.

The exception in favor of municipal self-regulation to the maxim that legislative power may not be delegated is here extended to quasi-municipal corporations such as counties. For a discussion of the tendency to limit the application of the maxim and to expand the exception, see 19 HARV. L. REV. 203.

CONTRACTS — CONSIDERATION — UNILATERAL CONTRACT TO PERFORM A LEGAL DUTY. — The defendant and the plaintiff exchanged promises, the defendant to contribute a certain sum per week to the support of the child of himself and the plaintiff, the plaintiff to vacate a certain alimony order. The defendant was the husband of the plaintiff, and was previously bound in law to do all that he promised. The plaintiff fully performed her side of the bargain, and now brings this suit for a breach by the defendant. The defendant contends that the contract is void for lack of consideration. *Held*, that though the defendant's promise was no consideration for that of the plaintiff, she may, under the circumstances, enforce his promise against him. *Ward* v. *Goodrich*, 82 Pac. Rep. 701 (Colo., Sup. Ct.).

To render a bilateral agreement binding the promises exchanged must be, reciprocally, adequate consideration. *Lingenfelder* v. *The Wainwright Brewing Co*, 103 Mo. 578. By the great weight of authority, also, neither a promise to perform a legal duty already owed to the promisee nor actual performance thereof is sufficient consideration for the reciprocal promise of the promisee. *Foakes* v. *Beer*, 9 App. Cas. 605. Tried by these principles, the bilateral agreement in the case at hand was bad. It seems clear, however, that in a unilateral agreement consideration need move only from the promisee, since the doing of an act requires no consideration. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS 208. Where performance of the bilateral contract is to take place in the immediate future, the reciprocal promises may also constitute cross offers to a pair of unilateral contracts. In such a case immediate performance, where

such is good consideration, may complete a binding unilateral contract, irrespective of the fact that neither the promisor's promise nor even his performance would have constituted good consideration for the bilateral agreement. The case under discussion may be explained on these grounds.

COPYRIGHT — INFRINGEMENT — RIGHTS OF ASSIGNEE OF COMMON LAW COPYRIGHT. — An artist sold to the plaintiff the exclusive right to reproduce one of his paintings. The plaintiff then took out a statutory copyright, and published photographic copies of the original, each bearing upon its face the notice of copyright. The original was never so marked. The defendant was printing lithographic copies of the painting. *Held*, that he may be enjoined. *Werckmeister* v. *American Lithographic Co.*, 34 N. Y. L. J. 991 (U. S. C. C., S. D., N. Y., Dec. 1905).

An artist has two distinct property rights in his paintings: first, the ownership of the physical substances; and, secondly, his common law copyright, consisting of the exclusive privilege of making copies until publication by him. It is well settled that he may assign this common law copyright, and that this assignment carries with it the right to secure the usual statutory copyright, even though the title to the painting itself is retained by the assignor. *Werckmeister* v. *Pierce & Bushnell Mfg. Co.*, 63 Fed. Rep. 445, reversed on another ground, 72 Fed. Rep. 54. This branch of the case, therefore, is unquestionably sound. Upon the further question, as to whether it is necessary for the protection of the assignee that the notice of copyright should be upon the original as well as upon the copies, there is a conflict of authority, due to a very ambiguous phrase in the statute. U. S. Rev. St., Act of June 18, 1874, c. 301, § 1. From the standpoint of statutory interpretation, the present decision, dispensing with the necessity of notice of copyright on the original, may perhaps be supported. From a practical standpoint, however, there is much to commend the opposite holding. *Cf. Pierce & Bushnell Mfg. Co.* v. *Werckmeister*, 72 Fed. Rep. 54. The purpose of the provision in the statute requiring notice on some visible portion of the copyrighted article is not only to warn persons that it is unlawful to make copies from the original, but also to warn purchasers that they cannot gain an absolute ownership. *Cf. Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53. Inasmuch as a buyer of an original painting without such notice would be as likely to be deceived as the buyer of a copy, the requirement that notice should be affixed ought to apply to both. *Cf. King* v. *Force*, 2 Cranch (U. S. C. C.) 208.

CORPORATIONS — CHARTERS: GRANT — EXCLUSIVE RIGHTS: WHETHER GRANTED BY IMPLICATION. — A city contracted with a water corporation that the corporation should have a right to furnish water for thirty years, and that during that time the city would not grant the same right to any other person. *Held*, that this did not preclude the city itself from furnishing water within the specified period. *Knoxville Water Co.* v. *Knoxville*, U. S. Sup. Ct., Jan. 2, 1906.

For a discussion of the principles involved, see 16 HARV. L. REV. 68.

CORPORATIONS — FOREIGN CORPORATIONS — LICENSE TAX UPON INTRASTATE BUSINESS. — A statute of North Carolina imposed a license tax "upon every meat packing house doing business in this state." The plaintiff in error, a foreign meat packing corporation, shipped prepared products to its several storage plants in the state, from which the products were sold for intrastate consumption. *Held*, that the plaintiff in error is liable for the tax under the statute. *Armour Packing Co.* v. *Lacy*, U. S. Sup. Ct., Jan. 8, 1906.

It is well settled that a state may impose a license tax upon a foreign corporation as a condition of its doing business therein. *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171; see BEALE, FOREIGN CORP. §§ 509, 752. The maintenance of a resident sales agency is "doing business" within the meaning of these restrictive measures. *Cone* v. *Tuscaloosa Mfg. Co.*, 76 Fed. Rep. 891. The principal question involved in the case at hand is whether the plaintiff in error was carrying on that kind of intrastate business intended to be affected by

the statute. A foreign meat packing company doing any dissimilar kind of business within the state could scarcely be held liable for the tax imposed. Nor, on the other hand, would it be reasonable to require that all the company's activities must have been pursued within the state to bring it within the measure in question. The fair and natural interpretation of the Act is that every meat packing house must pay a license tax if any part of its characteristic business is carried on within the state. The general proposition, involved in the decision, that the selling of its products constitutes a part of any manufacturing business, is scarcely more than a mercantile truism, and brings the plaintiff in error clearly within the meaning of the statute. See *Stewart* v. *Kehrer*, 115 Ga. 184.

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CREDITORS — FULL PAYMENT OF SHARES WITH PROPERTY. — Promoters, having options on a number of plants, with their good will, for $2,250,000, sold the property to a corporation, formed for the purpose of consolidation, at a valuation of about $5,000,000, paid in stocks, bonds, and some cash. The increased valuation was claimed to have been based on profits expected to be realized as a result of the pretended monopolization of the business. A New Jersey statute provided that stockholders were bound to pay unpaid shares whenever the capital was insufficient to satisfy creditors, but also allowed property to be purchased and stock to be issued "to the amount of the value thereof" in payment as full paid stock. A suit was brought by the receiver of the corporation on behalf of its creditors to recover payment on the stock ostensibly issued in exchange for the plants. *Held*, that prospective profits are not to be regarded as property under the statute. *See* v. *Heppenheimer*, 61 Atl. Rep. 843 (N. J. Ch.). See NOTES, p. 366.

DEATH BY WRONGFUL ACT — DAMAGES IN STATUTORY ACTION — LOSS OF PARENTAL CARE. — Under a statute allowing the personal representative of one killed by the wrongful act of another to sue for damages for the benefit of the widow and children, and providing that the sum recovered shall "one-half thereof go to the husband or widow, and one-half thereof to the children, of the deceased," the administrator sued. *Held*, that damages for the loss to the children of the parental care of the deceased cannot be recovered. *McCabe* v. *Narragansett Electric Lighting Co.*, 61 Atl. Rep. 667 (R. I.).

Under Lord Campbell's Act the amount recovered is apportioned among the beneficiaries in shares determined by the jury. Most American statutes provide that it be divided in the shares defined by the statute of distributions. Under either provision courts have almost unanimously allowed recovery for loss of parental care. *St. Lawrence, etc., Ry. Co.* v. *Leti*, 11 Can. Sup. Ct. 422; *Tilley* v. *Hudson River R. R. Co.*, 29 N. Y. 252. In construing the second form of statute most courts have held that its purpose is to compensate each beneficiary for the particular injuries suffered. See *Richardson* v. *New York, etc., R. R. Co.*, 98 Mass. 85. The illogical operation thereby given to the statute, by allowing damages for the separate injuries of each beneficiary and then distributing the whole in arbitrary shares among all the beneficiaries, has led some courts to adopt as the measure of recovery the amount which the deceased would probably have added to his estate. See *Railroad Company* v. *Barron*, 5 Wall. (U. S.) 90, 105; *Chicago, etc., R. R. Co.* v. *Woolridge*, 174 Ill. 330, 336. Even courts which adopt this latter view have inconsistently allowed recovery for loss of parental care. *Ittner Brick Co.* v. *Ashby*, 198 Ill. 562. The Rhode Island statute is so scantily worded as to leave in doubt the theory upon which recovery is based. Granting that the measure of recovery is the amount which the deceased would have added to his estate, as the court holds, damages for loss of parental care are clearly excluded.

DOMICILE — HUSBAND AND WIFE: POSSIBILITY OF SEPARATE DOMICILES. — The plaintiff was deserted by her husband, who is domiciled in West Virginia, and she thereupon removed to New York. She brought suit in the federal court for alienation of affections against the defendant, a citizen of West Virginia. *Held*, that a deserted wife may acquire a separate domicile

from her husband, and that the court therefore has jurisdiction because of the diversity of citizenship of the parties. *Gordon* v. *Yost*, 140 Fed. Rep. 79 (U. S. C. C., N. D., W. Va.).

The conceptions of domicile and citizenship have been closely assimilated in this country by the Fourteenth Amendment to the Constitution providing that a citizen of the United States shall be a citizen of the state where he lives. See *Dougherty* v. *Snyder*, 15 S. & R. (Pa.) 84. The domicile of a wife at common law is that of her husband. For the purpose of bringing suit for divorce, however, she can acquire a separate domicile, this exception being necessary to prevent condonation of the husband's offense. *Ditson* v. *Ditson*, 4 R. I. 87. Some authorities allow her this right under other circumstances. See *Dutcher* v. *Dutcher*, 39 Wis. 651, 659. The courts of one state, indeed, have abandoned the general rule altogether on the ground that a wife being *sui juris* may for all purposes acquire a domicile of her own. *Shute* v. *Sargent*, 67 N. H. 305. This extension seems on the whole to be ill-advised. The interests of the wife are protected if she is allowed to acquire a separate domicile whenever she seeks to terminate the marriage relation. Under all other circumstances the salutary rule based on the wife's duty to live with her husband should prevail. See *Dolphin* v. *Robins*, 7 H. L. Cas. 390; *Greene* v. *Greene*, 11 Pick. (Mass.) 410.

EJECTMENT — DISSEISIN REQUISITE TO MAINTAIN ACTION — ENCROACHMENTS ABOVE SURFACE. — A telephone company strung a wire over plaintiff's land without authority. *Held*, that ejectment lies to compel the removal of the wire. *Butler* v. *Frontier Telephone Co.*, 109 N. Y. App. Div. 217. See NOTES, p. 369.

EQUITY — JURISDICTION — RESTRAINT OF POLICE. — The plaintiff was proprietor of a "Raines Law" hotel and held a liquor license. A police captain stationed an officer before the establishment with orders to warn all persons about to enter that it was a disorderly house subject to raid at any moment and all persons found therein would be arrested. The plaintiff filed an affidavit denying that it was a disorderly house and prayed an injunction against the voluntary giving of such information by the officer. *Held*, that equity will not issue such an order, as it would be an unwarrantable interference with the duty of the police to prevent crime. *Delaney* v. *Flood*, 183 N. Y. 323.

As damage in this case would be irreparable, equitable relief should be granted unless contrary to public policy. The liquor traffic at best is fraught with grave public dangers and needs constant supervision to keep it within the law. Equity should not interfere with the police so as to paralyze this arm of public security or weaken a wholesome exercise of its powers. *Prendorill* v. *Kennedy*, 34 How. Pr. (N. Y.) 416. If equity granted this injunction and the charges proved true, it would have aided the commission of a crime. *Cf. Sterman* v. *Kennedy*, 15 Abb. Pr. (N. Y.) 201. Considering the conflicts between executive and judicial departments that would arise, the discretion necessarily vested in the police from the responsible character of their duties to prevent crime, the respect due the exercise of such discretion by other tribunals, and finally equity's reluctance to interfere with criminal proceedings, it is submitted that this is one of those cases where the right of the individual must yield to that of the public, and that chancery should in its discretion refuse jurisdiction. *Gilbert* v. *Mickle*, 4 Sandf. Ch. (N. Y.) 357.

ESTOPPEL BY DEED — TITLE BY ESTOPPEL: UNDER QUITCLAIM DEED. — The defendant Monahan gave the petitioner a quitclaim deed with a covenant of special warranty against all persons claiming under him. Title to the land was in R, from whom Monahan had undertaken to procure a conveyance through himself to the petitioner. Subsequently he did obtain a deed to himself from R. *Held*, that the after-acquired title passes from the grantor to the grantee, since the intention of the parties was to transfer the true title by the quitclaim deed. *In re Whitman*, 33 Banker & Tradesman 2734 (Mass. Land Ct.).

The American doctrine of estoppel by deed, limited to conveyances with covenants of warranty, applies to a quitclaim deed only if it purports to convey

the true title and not merely the grantor's present interest. *Hanrick* v. *Patrick*, 119 U. S. 156. Invariably, in order that title may pass by estoppel, the subsequently acquired paramount title must be from a source covered by the covenant; but in the present case the grantor did not claim under a title within the special warranty. *Cf. Bell* v. *Twilight*, 26 N. H. 401. Furthermore, as the deed was not ambiguous, the court was in error in looking at extraneous evidence to find that the intention of the parties was to pass the true title. *Muldoon* v. *Deline*, 135 N. Y. 150. Since the covenant of warranty did not cover the source of the later-acquired title, which to the knowledge of grantor and grantee was in a third party, the effect of the decision is to make a quitclaim deed without warranty, and which on its face does not purport to convey the true title, operate precisely like a warranty deed so far as the passing of a subseqently acquired title to the grantee is concerned — an apparently unsound extension of the doctrine of estoppel.

ESTOPPEL — ESTOPPEL IN PAIS — DIFFERENT, BUT NOT INCONSISTENT, STATEMENT OF POSITION. — The plaintiff presented a check at a bank and was told that the drawer had instructed the bank not to pay it. The bank, when sued, offered to prove that the drawer had no funds on deposit when the check was presented. *Held*, that the evidence is inadmissible, as the bank is estopped to set up a different defense from the one stated when payment was refused. *First State Bank of Overton* v. *Stephens Bros.*, 105 N. W. Rep. 43 (Neb.).

It is difficult to find estoppel in this case. A necessary element of estoppel is reliance upon the representation. *Lingonner* v. *Ambler*, 44 Neb. 316. Had the plaintiff relied upon the representation, he would not have sued, for, if true, it would have defeated his action. *Dykers and Van Alstyne* v. *The Leather Manufacturers' Bank*, 11 Paige (N. Y.) 612. Even if the bank were estopped to deny the representation, the offered evidence would be admissible, for showing that the drawer of a check has no funds on deposit is not inconsistent with saying that he stopped payment. Banks frequently honor overdrafts. This peculiar doctrine of estoppel first appears in Nebraska in a *dictum*, following a *dictum* of the United States Supreme Court. *Ballou* v. *Sherwood*, 32 Neb. 666. The Supreme Court lays down the broad principle that if a party states one reason for his conduct during the transaction, he is estopped to introduce another at the trial. *Railway Co.* v. *McCarthy*, 96 U. S. 258. A series of New York cases are cited by the Supreme Court holding that a bailee, after claiming title in himself, cannot set up his lien for charges when sued for conversion. The cases are plainly right in holding the lien forfeited; but they fail to support the broad principle which the court bases upon them. Unfortunately, the *dictum* has been followed literally in several states.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY OR AGAINST — EXECUTORSHIP DISTINGUISHED FROM A TRUST. — A testator bequeathed all his property to his wife and daughter and appointed his wife sole executrix. The daughter, the present plaintiff, who was one year old at the time of her father's death, attained her majority in 1876. Though she was not ignorant of the provisions of the will, this action against her mother's executors for an accounting was not brought until 1903. *Held*, that the action is statute-barred. *In re Mackay*, [1906] 1 Ch. 25.

All executors except those who are express trustees are protected by the Statute of Limitations (37 & 38 Vict. c. 57, § 8). *In re Rowe*, 58 L. J. Ch. 703. An executor can become an express trustee, apart from the provisions of the will, only by his own declaration that he holds in trust. *In re Davis*, [1891] 3 Ch. 119. The question arises whether the disability of a legatee, arising from his infancy, will make the executor an express trustee by force of the will. In such a case, an executor has been held a trustee within the purview of a statute defining the powers of a trustee for an infant. *In re Smith*, 42 Ch. D. 302. But that case should not be deemed controlling, since it merely involved an interpretation of the provisions of the Conveyancing Act. Moreover, the word trustee is often used in a loose sense to include executors, while the Statute of

Limitations in question has been held to run in favor of all executors not express trustees. *In re Barker*, [1892] 2 Ch. 491. Moreover, the opposite view would seem to make all executors and administrators trustees for legatees under disability, a position for which no authority has been found. *Cf. In re Davis*, *supra.*

JUDGMENTS — COLLATERAL ATTACK — ATTACK ON PROBATE DECREE FOR WANT OF JURISDICTION. — In Wisconsin a statute provided that when any person should die intestate leaving property within the state, the county court having jurisdiction should grant administration. A county court issued letters of administration to the plaintiff; but upon his bringing suit for causing the death of the intestate, the defendant alleged that such court had acted without jurisdiction since the deceased left no property within the state. *Held*, that the finding of the county court cannot be thus collaterally impeached, and that, moreover, there are sufficient facts to uphold its jurisdiction. *Jordan* v. *Chicago, etc., Ry. Co.*, 104 N. W. Rep. 803 (Wis.).

An alleged judgment of the court of a sister state can always be attacked collaterally on the ground that such court was without jurisdiction. The reason generally given is that under such circumstances there exists no valid judgment entitled to recognition. See *Thompson* v. *Whitman*, 18 Wall. (U. S.) 457. This reasoning has been applied to alleged judgments of domestic courts. *Ferguson* v. *Crawford*, 70 N. Y. 253; but see, as to surrogates' courts, N. Y. Code Civ. Proc. § 2473. Under this theory any judgment should be assailable for lack of jurisdiction. See *Pollard* v. *Wegener*, 13 Wis. 569. Hence at common law a probate decree for the administration of the estate of a living person may be collaterally impeached. *Scott* v. *McNeal*, 154 U. S. 34. Of such an estate, it is evident that no probate court whatever can have jurisdiction. But by the great preponderance of authority other domestic judgments of a superior court of general jurisdiction, usually including probate decrees, cannot be questioned except by a direct proceeding for the purpose, unless their invalidity appears upon the record. *Cook* v. *Darling*, 18 Pick. (Mass.) 393. Their very validity is conclusively presumed as against collateral attack. The illogical difference in treatment between a domestic and a foreign judgment may be justified by the demand for a stable system of justice and by the comparative ease with which a domestic judgment can be directly overthrown.

JUDGMENTS — SETTING ASIDE AND VACATING JUDGMENTS — VACATION OF JUDGMENT OF DIVORCE AFTER DEATH OF A PARTY. — A husband procured a decree of divorce against his wife. After his death the wife moved to have the decree set aside on the ground that the court acted without competent jurisdiction, and gave notice of this motion to his executors. *Held*, that the decree should not be set aside. *Dwyer* v. *Nolan*, 82 Pac. Rep. 746 (Wash.).

Some courts hold that a decree of divorce is final and can never be set aside because of the extensive collateral effect on third parties. *Parish* v. *Parish*, 9 Oh. St. 534. But the general rule is that a judgment in a divorce suit, like that in any other, will be vacated on a proper application showing good cause. *Johnson* v. *Coleman*, 23 Wis. 452. However, since divorce involves a personal relation, the courts, after the death of either party, will entertain no proceedings looking to the further settlement of the right of divorce *per se*. *O'Hagan* v. *Executor of O'Hagan*, 4 Iowa 509. But when property rights are dependent upon the validity of the decree, it is held to be open to review. *Rawlins* v. *Rawlins*, 18 Fla. 345. The proper method of procedure, however, is not to move in the same cause and give notice to the executor, but to sue out an original bill joining as defendants the executor, heirs, and all others in interest. *Watson* v. *Watson*, 1 Hun (N. Y.) 267. The plaintiff's error, therefore, was in failing to use this method of procedure.

LANDLORD AND TENANT — COVENANT IN LEASE — RIGHT OF THIRD PARTY UNDER COVENANT TO REPAIR. — The defendant demised an unfurnished house to the plaintiff's husband, without any covenant to repair, but

later agreed with him to repair the kitchen floor. The defendant failed to repair, and the plaintiff was injured by reason of the defect. *Held*, that the plaintiff has no cause of action against the defendant. *Cavalier* v. *Pope*, 43 L. T. R. 475 (Eng., C. A., Aug. 9, 1905).

In general the duty of a landlord to put the demised premises in safe condition rests solely upon special contract, unless the particular circumstances of the case are sufficient to raise that duty independently. *Witty* v. *Matthews*, 52 N. Y. 512. Where the landlord is under no duty to make the premises safe, he is not responsible for injuries caused during the term by a defect therein, even though the premises were defective when let, unless the defect were peculiarly within his knowledge. *Lane* v. *Cox*, [1897] 1 Q. B. 415; *Robbins* v. *Jones*, 15 C. B. N. S. 220. Even where the landlord has covenanted to repair, he is not in general liable in tort for injuries caused by his breach of covenant, since ordinarily such breach is not negligence. *Sanders* v. *Smith*, 5 N. Y. Misc. 1; *Tuttle* v. *Gilbert Mfg. Co.*, 145 Mass. 169. But if, by reason of the failure to repair according to the covenant, the premises become a public nuisance, and one of the public is injured thereby, then, to avoid circuity of action, the injured party may be allowed to proceed directly in tort against the landlord. See *City of Lowell* v. *Spaulding*, 4 Cush. (Mass.) 277. In the principal case no public nuisance was created, nor was the plaintiff a party to the covenant; consequently she could not recover. *Cf. Sterger* v. *Van Sicklen*, 132 N. Y. 499.

LANDLORD AND TENANT — ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE. — A dispute arose between A and the plaintiff concerning the present right to certain land. The defendant, who had entered into possession under a lease from A, to avoid a threatened ejectment by the plaintiff, accepted a lease for years from him, though he continued also to hold under A. After expiration of the term demised by the plaintiff, he remained in possession as A's tenant, paying no rent to the plaintiff, or otherwise acknowledging him as landlord, though he did no affirmative act to terminate the tenancy. The plaintiff sued out a writ of distress for rent from the expiration of the term demised by him. *Held*, that he cannot recover. *Hodges* v. *Waters*, 52 S. E. Rep. 161 (Ga.). See NOTES, p. 375.

LEGACIES — LAPSED BEQUESTS — APPLICATION OF STATUTE PREVENTING LAPSE. — A statute provided that when any estate should be bequeathed to a child of the testator and such child should die during the testator's lifetime, leaving a descendant who should survive the testator, such legacy should not lapse but should vest in the surviving descendant of the legatee. A testator, by his will, directed the payment of $500 "to each of my children." *Held*, that the surviving child of one of the testator's children who had died, as the testator knew, before the making of the will, is not entitled to $500. *Pimel* v. *Betjemann*, 183 N. Y. 194.

This decision reverses that of the lower court, which was adversely commented upon in 18 HARV. L. REV. 622.

MARRIAGE — NULLIFICATION — ALIMONY PENDENTE LITE. — In an action brought by a wife against her husband to annul the marriage, the wife applied for alimony *pendente lite*. *Held*, that the application for alimony is inconsistent with the plaintiff's contention that the marriage is a nullity, and is accordingly denied. *Jones* v. *Brinsmade*, 34 N. Y. L. J. 829 (N. Y., Ct. App., Dec. 5, 1905).

In the absence of a statute so providing, the allowance of alimony *pendente lite* is generally not a matter of absolute right, but rests in the discretion of the court. *Glasser* v. *Glasser*, 28 N. J. Eq. 22. By the weight of authority it is necessary that the existence of the marriage relation should be admitted or shown as a prerequisite to the granting of alimony *pendente lite*. *Collins* v. *Collins*, 80 N. Y. 1. But a judgment annulling a marriage in effect declares that a valid marriage never existed between the parties. *Chase* v. *Chase*, 55 Me. 21. The plaintiff in the case at hand denies the first prerequisite of her petition for alimony. Reason, therefore, as well as authority is opposed to granting her

application. *Meo* v. *Meo*, 2 N. Y. Supp. 569; *Taylor* v. *Taylor*, 7 Colo. App. 549. There is, however, authority for granting alimony *pendente lite* to the wife in a suit by the husband to annul the marriage. *Vroom* v. *Marsh*, 29 N. J. Eq. 15. But that case is the converse of the present, since the party seeking alimony is the party who supports the validity of the marriage.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — LIABILITY, AS OWNER, FOR TRESPASS OF ANIMALS. — Through the negligence of an employee of the city fire department, a horse escaped from custody and trespassed upon the plaintiff's lawn. *Held*, that the city is not liable, the conduct of the fire department being a governmental function. Two justices dissented. *Cunningham* v. *City of Seattle*, 82 Pac. Rep. 143 (Wash.).

The non-liability of a municipal corporation for negligence in the administration of purely governmental functions is well established. Whether this immunity should extend to negligence in the construction and maintenance of buildings devoted to such functions is a subject of considerable conflict, though the weight of authority seems to be with the extension. *Kelley* v. *Boston*, 186 Mass. 165; *Gray* v. *Griffin*, 111 Ga. 361; *contra*, *Powers* v. *Philadelphia*, 18 Pa. Super. Ct. 621. The case above noted presents for the first time, it is believed, the question whether that absolute liability which the common law imposes for trespasses of animals should rest upon a municipal corporation owning such animals only in connection with governmental activities. No reason is perceived why authorities which extend the municipality's immunity to the negligent maintenance of public buildings should not further extend it to include the present facts. It is the general tendency of western jurisdictions, moreover, to deny the application to their conditions of the common-law doctrine relative to absolute liability for the trespass of animals. *Wagner* v. *Bissell*, 3 Ia. 396. And § 2546 of the Washington General Statutes of 1891 contains a provision looking in the same direction. But it would seem that public policy is sufficiently satisfied by such a limitation of the municipality's immunity as would exclude this case.

PARENT AND CHILD — PARENT'S RIGHT TO CUSTODY — JUVENILE COURT ACTS. — The county court was authorized by statute to commit to certain state homes for children any delinquent child. A delinquent child was defined as any child under sixteen years of age who violates any law, is incorrigible, knowingly associates with thieves, vicious, or criminal persons, is growing up in idleness or crime, etc. The son of the petitioner was committed to a home for boys during his minority, or until he should be legally discharged, for having committed two criminal assaults. The father brought a writ of *habeas corpus* on the ground that the commitment was unconstitutional, and proved that he could provide a good home for the child. *Held*, that the detention is illegal. *People* v. *McLain*, 38 Chi. Leg. N. 166 (Ill., Sup. Ct., Dec. 20, 1905). See NOTES, p. 374.

PARTNERSHIP — DISSOLUTION AND WINDING-UP — RECEIVER'S COMPENSATION AS SUBJECT TO SET-OFF. — The defendant, a partner in a firm, had been appointed receiver thereof on the usual terms. The partnership accounts showed that the defendant was an insolvent debtor to the firm for £1400. The master had allowed him £280 for his remuneration as receiver, which it was contended should be set off against the debt the defendant owed to the partnership. *Held*, that the defendant is entitled to his compensation as receiver without regard to this debt. *Davy* v. *Scarth*, [1906] 1 Ch. 55.

In order to have a cancellation of obligations by set-off, both of such obligations must have arisen between the immediate parties to the action or their privies. See WATERMAN, LAW OF SET-OFF, 1st ed., § 133. In the present case the court failed to find that the obligations had so mutually arisen because of the intervention of the court itself in appointing the defendant as receiver. After his appointment the defendant was an officer of the court. The court, then, having sanctioned this arrangement, became honorably responsible for the payment of his compensation, irrespective of any debts which the defendant owed to the partnership as an individual. On a similar principle it has been held that when a

receiver sues in his representative capacity for the purchase price of property sold, the purchaser cannot set off a private debt due from the receiver even to the extent of the latter's commissions from the sale. *Polk* v. *Coal & Mining Co.*, 91 Ia. 570. Though the present case is supportable on the court's reasoning, it would seem that the set-off might have been allowed, as both obligations may be considered, for all practical purposes, to have arisen between the same parties. *In re Union Bank*, 37 N. J. Eq. 420.

PARTNERSHIP — NATURE — PARTNERSHIP FOR SINGLE TRANSACTION. — The plaintiff, the defendant, and two others agreed among themselves to purchase jointly a certain piece of real estate, taking title in the defendant's name, to resell it and to divide the profits The plaintiff procured a purchaser, but the defendant refused to convey at the price offered, whereupon the plaintiff brought this action at law. *Held*, that the agreement between the parties created a partnership, and that the plaintiff's remedy is therefore in equity to terminate the relation and for an accounting. *Mitchell* v. *Tonkin*, 109 N. Y. App. Div. 165.

The entering together as joint principals upon a continued series of transactions constituting a course of business would generally be held sufficient to constitute a partnership. *Chester* v. *Dickerson*, 54 N. Y. 1. A certain degree of complexity and continuity should characterize the relation. This may plainly be present, although the dealings are to be with respect to a single *res*, as where a tract of land is to be bought, subdivided, and retailed. *Winstanley* v. *Gleyre*, 146 Ill. 27. But if the agreement is for a simple transaction, as for a purchase and sale in gross, it seems unnecessary to find a partnership and to annex the consequences of that relation. *Clark* v. *Sidway*, 142 U. S. 682; see *Gottschalk* v. *Smith*, 156 Ill. 377. Yet, as this distinction is not often taken, the present case has the support of most of the authorities. See *Yeoman* v. *Lasley*, 40 Oh. St. 190; *Spencer* v. *Jones*, 92 Tex. 516.

QUASI-CONTRACTS — RECOVERY FOR BENEFITS CONFERRED WITHOUT CONTRACT — PAYMENT OF TAXES BY LESSOR. — Under a lease of land, without buildings, the lessor covenanted to save the lessee harmless for all taxes upon "said premises." The lessee subsequently erected buildings, which were to be his own property. The lessor paid the tax, assessed as an entire tax, on land and buildings, and sought to recover from the lessee the proportion assessed against the latter's buildings. *Held*, that he can recover. *Phinney* v. *Foster*, 189 Mass. 182.

The court interpreted the covenant to save harmless to apply only to the lot, so that, as between lessor and lessee, the tax on the buildings was intended to be borne by the lessee. Yet, since the tax was not apportionable, the latter resisted the claim because no legal liability towards the city existed against him. But payment of the tax released the lien on the lessee's buildings — his property was bound, though not he personally. *Cf.* Mass. R. L. c. 12, § 60 and c. 13, § 35; *McGee* v. *Salem*, 149 Mass. 238. The plaintiff thus brought himself within two well recognized doctrines of quasi-contracts: recovery for satisfaction of the defendant's obligation (here a real one) to redeem the plaintiff's property from an encumbrance referable to the defendant's non-payment; and secondly, for payment of a claim which in justice, as between the parties, was owing from the defendant. KEENER, QUASI-CONTRACTS c. 9. So, recovery has been allowed for taxes for which the defendant was not personally liable but which he expressly agreed to pay. See *Lageman* v. *Kloppenburg*, 2 E. D. Smith (N. Y.) 126. And similarly, in an analogous case, when there was no statutory provision for apportionment of taxes between the tenant by dower and the reversioner, an equitable apportionment has been enforced. *Graham* v. *Dunigan*, 2 Bosw. (N. Y.) 516; see also *Linden* v. *Graham*, 34 Barb. (N. Y.) 316. Of course, payment of taxes by a volunteer gives no right to reimbursement.

RESTRAINT OF TRADE — CONTRACTS TO EMPLOY ONLY UNION MEN — VALIDITY. — *Held*, that a contract between an employer, union laborers, and

their labor union, which provided that only members of the union in good standing should be employed or should continue in employment, is valid, and a note given by the employer to secure his performance is collectible. Two judges dissented. *Jacobs* v. *Cohen*, 183 N. Y. 207. See NOTES, p. 368.

SALES — CONDITIONAL SALES — RISK OF LOSS. — A horse was sold and delivered on condition that the vendor should retain title until he received payment in full. The horse died without fault of the vendee before part of the purchase price became due. *Held*, that the vendor may recover such balance. *Lavalley* v. *Ravenna*, 62 Atl. Rep. 47 (Vt.).

On the question involved in this case there is a sharp conflict of authorities. *Cf. Tufts* v. *Griffin*, 107 N. C. 47; *Bishop* v. *Minderhout*, 128 Ala. 162. The present decision, however, is supported by the weight of authority and seems correct on principle. See 14 HARV. L. REV. 626. In the ordinary conditional sale the practical import of the agreement is that the buyer shall immediately receive all of the incidents of ownership except the bare legal title. He obtains not only the possession but also the use and enjoyment of the commodity sold. If he refuses to make the stipulated payments, he is liable in an action for goods sold and delivered. *Smith* v. *Aldrich*, 180 Mass. 367. Similarly, the seller cannot, by refusing to receive the money due, repudiate the transaction and limit his liability to a personal action. See *Carpenter* v. *Scott*, 13 R. I. 477, 479. As the parties have in mind the same results that would be attained by a transfer of title and a mortgage back to the seller, the legal results should be the same if possible. The transaction is accordingly regarded as executed rather than executory. See 9 HARV. L. REV. 106, 109. Reason and consistency with the mortgage analogy plainly require that the risk should follow the beneficial ownership rather than the security title.

SALES — TITLE OF GOODS SUBJECT TO BILL OF LADING — ATTACHMENT OF GOODS IN POSSESSION OF BAILEE. — A consignor took a bill of lading to his own order and pledged it. His creditor later attached the goods in the possession of the carrier. *Held*, that the pledgee's lien prevails over the attachment. *Kentucky Refining Co.* v. *Bank of Morilton*, 89 S. W. Rep. 492 (Ky.). See NOTES, p. 370.

SALES — TITLE OF GOODS SUBJECT TO BILL OF LADING — CONSIGNMENT TO BUYER: DRAFT FOR MORE THAN CONTRACT PRICE. — Under a contract of sale the defendant shipped flour to the plaintiff. The bill of lading, made out to the plaintiff as consignee, was sent to a bank, with a draft attached for a sum larger than the contract price. The plaintiff sued the defendant for breach of contract, attaching the flour as the property of the defendant, in order to gain jurisdiction over the defendant, who was a non-resident. The defendant moved to dissolve the attachment on the ground that title to the flour was in the plaintiff. *Held*, that as the defendant had indicated intention to retain title by sending the bill of lading to the bank, he is still the owner. *Greenwood Grocery Co.* v. *Canadian, etc., Co.*, 52 S. E. Rep. 191 (S. C.).

In this class of cases the seller clearly indicates an intent to retain some control over the property when he forwards the bill of lading and a draft together. The court holds, on the common law theory, that the bill of lading is mere evidence of the intent of the parties; and as that evidence is rebutted in the present case, the title never passed from the seller. The mercantile theory is that the title follows the form of the bill of lading, so that here the buyer would have title, while the seller retains a lien by his possession of the bill. See 18 HARV. L. REV. 307. The latter theory, though comparatively modern, is generally preferable, as it allows the purchaser or lender to rely with safety upon the form of the bill. However, it seems that, even by the mercantile theory, no title passed to the buyer on the peculiar facts of the present case. The consent of both parties is necessary for passing title; and here there can be implied no consent on the part of the buyer to accept a title encumbered by a lien for a sum greater than the contract price.

TORT — NEGLIGENCE — LIABILITY OF CONTRACTOR TO THIRD PARTIES. — Under a contract with county commissioners, a bridge company, knowing of latent defects in a bridge, turned it over to the commissioners, who opened it for public use. The plaintiff, a stranger to the building contract, in passing over the bridge sustained personal injuries due to the latent defects. *Held*, that the bridge company is liable to the plaintiff for the injuries suffered. *Casey* v. *Hoover*, 89 S. W. Rep. 330 (Mo., Kansas City Ct. App.). See NOTES, p. 372.

WASTE — RIGHT OF LIEN-HOLDER TO BRING ACTION AT LAW. — The defendant, being in possession of land upon which, as he knew, rested a heavy lien for unpaid taxes, removed a building, thereby rendering the real estate insufficient to answer for the assessments. *Held*, that he is liable to an action for waste at the suit of the county. *Lancaster County* v. *Fitzgerald*, 104 N. W. Rep. 875 (Neb.).

An injunction against such waste as would impair the security has been obtained by a judgment creditor with a lien upon land, and by one who has levied an attachment before suit begun. *Jones* v. *Britton*, 102 N. C. 166; *Camp* v. *Bates*, 11 Conn. 50. The law which gives a lien must, to give it value, protect it from the danger of interference which may result in injury to the plaintiff. On the other hand, it has been frequently said that to support a common law action of waste, or in the nature of waste, a legal title is necessary. See *Webb* v. *Boyle*, 63 N. C. 271. Yet a mortgagee has been allowed to sue even in states where he secures only a lien upon the mortgaged property. *Van Pelt* v. *McGraw*, 4 N. Y. 110; *Jackson* v. *Turrell*, 39 N. J. Law 329. A lienholder possesses a substantial interest, so that at least where a defendant has, as in the principal case, knowingly impaired that security-interest by conduct not in the ordinary enjoyment of the premises, he seems to have committed a tort which should render him liable. See *Yates* v. *Joyce*, 11 Johns. (N. Y.) 136.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

LIABILITY OF STOCKHOLDERS AS PARTNERS WHEN INCORPORATION IS DEFECTIVE. — A recent article attempts to place upon a reasoned basis this doctrine, which some courts have adopted as a desirable result. *Are Defectively Incorporated Associations Partnerships?* Francis M. Burdick, 6 Columbia L. Rev. 1 (Jan., 1906). The writer maintains that a creditor of a supposed corporation, upon discovering the incorporation to be defective, can sue the stockholders as partners upon the principle by which a creditor of a partnership recovers against a dormant partner. Where shares of stock are issued but the attempt to incorporate fails, there is lacking no element necessary to a partnership in fact if "the common business is carried on with the capital thus contributed; by agents designated by the contributors in accordance with the will of the contributors and for their profit." If these elements are present, the absence of an "intention to incur the liabilities of partners . . . does not prevent the existence of a partnership." Professor Burdick denies that any reason exists for applying the rule that the validity of a corporation shall not be attacked collaterally, in an action to charge the stockholders with partnership liability.

The majority of the American decisions deny the existence of this general liability of stockholders as partners when incorporation is defective. See BURDICK, PARTNERSHIP 34. That no such liability is incurred by stockholders who succeed in creating a corporation *de facto* seems now to be well established. *Stout* v. *Zulick*, 48 N. J. Law 599; *Finnegan* v. *Noerenberg*, 52 Minn. 239. Professor Burdick's argument against the application of the rule prohibit-